

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-5116

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SASAN GHAZAL,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., Chief District Judge. (3:09-cr-00053-RJC-1)

Submitted: September 12, 2011

Decided: September 14, 2011

Before DUNCAN, DAVIS, and DIAZ, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

Claire J. Rauscher, Ann Loraine Hester, Rahwa Gebre-Egziabher, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Charlotte, North Carolina, for Appellant. Anne M. Tompkins, United States Attorney, Charlotte, North Carolina; Amy E. Ray, Assistant United States Attorney, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Sasan Ghazal appeals his thirty-three month sentence for possession of a pipe bomb in violation of 26 U.S.C. §§ 5841, 5861(c), (d), (i), 5871 (2006). Ghazal argues that his sentence was procedurally unreasonable because the district court erred in calculating his Guidelines sentence by finding that he was a "prohibited person" for purposes of U.S. Sentencing Guidelines Manual ("USSG") § 2K2.1(a)(4)(B) (2008). A sentence is procedurally unreasonable if the district court improperly calculated the offender's Guidelines range of imprisonment. United States v. Boulware, 604 F.3d 832, 837-38 (4th Cir. 2010).

Ghazal claims that he was not a "prohibited person" for purposes of USSG § 2K2.1(a)(4)(B) because he had not been previously convicted of a crime punishable by imprisonment for a term exceeding a year. Ghazal's criminal history disclosed a 2006 North Carolina conviction for possession of ecstasy, but, under North Carolina's structured sentencing regime, Ghazal could not have received a custodial sentence of more than a year given his criminal history. When Ghazal raised this argument in the district court, it was foreclosed by our decision in United States v. Harp, 406 F.3d 242 (4th Cir. 2005). Subsequently, however, we overruled Harp with our en banc decision in United States v. Simmons, __ F.3d __, 2011 WL 3607266 (4th Cir.

Aug. 17, 2011) (en banc). Pursuant to the dictates of Simmons, we sustain Ghazal's objection here.

Accordingly, the district court's judgment is affirmed as to the unchallenged conviction, vacated as to the sentence, and the case is remanded for resentencing. We deny Ghazal's pending motion to file a supplemental brief. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED